SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902

NO. 336

MEXICAN CENTRAL RAILWAY COMPANY, LIMITED, PLAINTIFF IN ERROR.

v.

J. M. DUTHIE, DEFENDANT IN ERROR.

CERTIFIED CASE

Error to the United States Circuit Court, Western District of Texas.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

We find no objection to make to appellant's statement of the nature and result of the suit, except that in making their statement of the action taken in the case, after rendition of judgment they should have said;

"after entry of judgment no further proceedings "were had in the cause until the 17th day of April

"following, when plaintiff filed a motion asking "leave to amend his original and first amended "original petitions by inserting therein, after the "allegations thereof as to plaintiff's residence, the "words 'and is a citizen of said State and of the "United States of America' so as to read: That "plaintiff resides in El Paso, in El Paso County, "State of Texas, and is a citizen of said State and "of the United States of America, which motion "was supported by the affidavit of the plaintiff "avering *under oath* that he was *at the time the "injuries were received, at the time the suit was "instituted and still is* a citizen of the State of "Texas and of the United States. This motion "came on to be heard on the day it was filed and "was duly submitted to the Court by both parties. "And thereupon after due consideration the "motion was sustained and the amendment al- "lowed.

In answer to the brief of learned Counsel for appellant, we shall devote our attention to what we deem the only issues in the case and the only matters of importance necessary to consider and those are, First: whether the trial Court had the right, or rather whether or not it was within the discretionary right of the Court to allow the amendment complained of after verdict and judgment had been rendered in the cause. Second: Whether the judgment rendered in this cause was

validated and made effective by reason of the amendment.

Proposition.

The trial Court may at any stage of the cause and at any time, while the case is within the control of the trial Court, in its discretion, permit amendments to be made to the pleadings, and, if the record discloses no abuse of the discretion of the trial Court in the premises, the Supreme Court will not interfere. U. S. R. S. Sec. 954.

For indeed in our opinion do the answers to these questions either affirm or reverse the judgment of the lower Court.

Argument of Appellee.

It is not pretended that plaintiff in error, defendant in the Court below, had at any time filed any plea in abatement, plea to the jurisdiction or special exception setting up the want of allegation of diverse citizenship, nor did the general demurrer, upon which there was no argument but simply the statement made to the Court that defendant plead the general demurrer and general denial, in any other than its general way call the Court's attention to the defect in the original and first amended petitions.

In Robertson v. Cease 97 U. S. 640, the first case cited by plaintiffs in error, no amendment, or motion to amend, was made in the trial court so as to supply the defective averment of or failure to aver citizenship.

The court in reversing this case, as it was compelled to do for want of sufficient allegations of citizenship, used this significant language with regard to the demurrer in that case, "such a course is peculiarly proper in this case (speaking of the course pursued by the court in Morgan v. Gay, 19 Wall 81) in view of the failure of plaintiff in error to make, in the court below, the precise question of jurisdiction which he urges upon our consideration. He filed, it is true, a plea to the jurisdiction of the circuit court; but did not impeach its jurisdiction upon the *distinct ground* that Cease did not appear to be a citizen of the State in which he resided. His denial of jurisdiction was upon the ground that the assignment to Cease was merely colorable, and for the fraudulent purpose of dispensing with letters of administration upon Chamblin's estate in Texas, thereby making a suit to be brought, in the court below, in the name of the assignee, but really for the use and benefit of that estate." In the above case the court went on further to say "After verdict, Robertson moved in arrest of judgment, upon the general ground that there was, "No cause of action stated in plaintiff's petition of which this court can take cognizance, and because it appears from the face of the pleadings that this court has no jurisdiction of the cause." But we can not feel sure, from this general language or from any thing in the record, that attention was called to the court below to the defect in the pleadings to which our attention has been specifically directed."

In the case at bar no motion in arrest of judgment was made in the court below by plaintiffs in error, nor does the record disclose that the attention of the court below was called to the particular defect of which plaintiff in error now complains, except through the general demurrer not argued nor even read to the court, and to which the only reference made was the statement of counsel to the court that "defendant pleads the general demurrer and general denial."

There is no question of nor do we dispute the soundness of the proposition that the Supreme Court would *sua sponte* reverse the judgment, if no action, such as was taken to remedy the defect in the pleading, had been taken, but no case is cited nor are we able to discover one in which the Supreme Court has held that the action of the lower court as shown by the record in this case has been erroneous.

In the second case cited by plaintiff in error "Timmons v. Elyton Land Co., 139 U. S. 378 no such question as is presented in this case was considered. In that case the record on appeal failed to show the necessary allegation of citizenship, and in said case no effort was made in the lower court to supply the allegation either before or after judgment.

Horne v. Hammond Co. 155 U. S., 393 and Chapman v. Barney 129 U. S. 677-81 cited third and fourth by plaintiff in error, reiterate the rule as stated in Timmons v. Elyton Land Co., that is, that the Supreme Court must take notice of the fact that the record fails

to disclose the citizenship of the parties. As to the matter of amendment, however, the Supreme Court in Chapman v. Barney *supra* in passing upon the discretionary power of the trial court to permit amendments, and this right of the trial court was questioned on the appeal, say, "We do not think the first assignment of error well taken. Amendments are discretionary with the court below, and not reviewable by this court."

Everhart v. Huntsville College 120 U. S. 223-4 and King Bridge Co. v. Otoe County 120 U. S. 225-26 go no further than to restate the rule that the Supreme Court must take notice of the omission from the record of the averment of citizenship. In none of these cases was any amendment attempted in the only court in which amendment could be allowed, viz. the trial court.

The record in the case at bar discloses the necessary facts to sustain the jurisdiction of the court.

"Trial court may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe." U. S. R. S. Sec. 954.

The court permitted the amendment to be made during the term at which the judgment was rendered. The court still had control of the case. The parties were in court. The proof of citizenship, plaintiff's affidavit in support of his motion asking leave to amend, was made.

No contest was made by defendant, no time asked in which to make such contest, no testimony offered by defendant upon the issue made by the motion and its supporting affidavit, no time asked within which to secure and introduce testimony. In fact defendant must have been satisfied, so far as this record shows that the motion and affidavit spoke the truth and could not be truthfully contested but relied solely on the technical ground that the matter of permitting the amendment had passed beyond the power and discretion of the trial court. Judgments are under the control of the Court where entered until the close of the term." Black on Judgments Vol. 1 Sec 153.

North American Transportation &c., Co. v. Morrison, 178 U. S. 262, 267 is, in our opinion, not in point. While it is true, that in that case, there was a defective, or absence of a necessary, allegation of citizenship for which the case would, in the absence of other objectionable features have been reversed, the reversal was in effect on account of misjoinder of causes of action rather than upon the other ground.

In Southern Pacific Co. v. Denton, 146 U. S. 203, 205. The proposition is laid down that "when the want of jurisdiction is apparent on the face of the petition, it

may be taken advantage of by demurrer, and no plea in abatement is necessary." See 4th paragraph of Syllabus. In the above case however, the plaintiff in error, defendant below, "did file a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer was over-ruled, and the defendant had excepted to the over-ruling thereof, that an answer to the merits was filed," and the court further in the opinion very correctly says: "Neither the special appearance for the purpose of objection to the jurisdiction, nor the answer to the merits after that objection had been over-ruled was a waiver of the objection."

In the case at bar no appearance was made for the *special* purpose of objecting to the jurisdiction, no demurrer was filed *specially* calling the attention of the court to the want of the jurisdictional averment.

In Sullivan v. Steamboat Co., 6 Wheat. 450 the suit was dismissed in the lower court for the want of sufficient or necessary averment of citizenship. From the judgment appeal was prosecuted and the judgment of the lower court affirmed. No attempt was made in the lower court to amend the pleading.

In Garland v. Davis 4 Howard 131, the judgment of the lower court was reversed for defect, appearing in the record on appeal, but not attempted to be remedied in

the trial court, if indeed such a defect, defect in the verdict as well as the pleading, could under the circumstances of that case have been then remedied, after the case had gone to trial upon the existing state of the pleadings of the respective parties, the defect being in the pleading and verdict. However the defects were not noticed in the Court below, much less any attempt made there to remedy such defects.

Says Mr. Justice Woodbury in delivering the opinion of the majority of the court

"In the examination of this case, a defect has been "discovered in the pleadings and verdict, which "was not noticed in the court below nor suggested "by counsel here." And further:

"So it is the duty of the court to give judg- "ment on the whole record and not merely on the "point stated by counsel (Slacum v. Pomeroy 6th "Cranch. 221; Baird & Co. v. Mattox I Call. 257, "16 Peters 319) Then further "I proceed to con- "sider the nature and character of the dificulty in "this cause, appearing in the record."

"The declaration is an action on the case "sounding in tort. It sets out no contract except "one by way of inducement, made by Mr. Frank- "lin, the predecessor in office of defendant, and "it then proceeds to make the gist of its complaint "a wrongful and injurious neglect and refusal by "the defendant to furnish a copy of certain laws "to the plaintiff, as had been agreed by Franklin.

"We are required to take this view of the decla-
"ration, not only by the averment in it, but both
"by the present and past positions of the counsel
"for plaintiff, that it was intended to be founded
"on a misfeasance. The plea, however, instead
"of being "not guilty," as was proper in such a
"case, is non assumpsit, and the plaintiff below,
"not demurring thereto, not moving for judgment
"notwithstanding such a plea, joined issue upon
"it, and the verdict conforms to the plea and issue
and merely finds, "that the defendant did not as-
"sume upon himself in manner and form &c., and
"assesses damages "sustained by reason of the
"non performance of the promise and assumption
"aforesaid."

Thus it will be seen that the verdict and judgment were reversed in Garland v. Davis, not, strictly speaking, upon defective pleading, but upon issues joined and trial had on the inconsistent, improper and bad plea of non assumpsit to a declaration in an action on the case sounding in tort. and we submit that counsel are mistaken in contending that the case is in point with the one now being considered.

Counsel for plaintiff in error insists that in Smith v. Jackson, 1 Paine, 482, 22 Fed. Cases, 13,065, 576. "the points involved were identical with these here in issue." We quote from their brief, p. 9. In this counsel drop into two very material errors.

First: The defective pleading in the case of Smith

v. Jackson was not attempted to be amended in the lower court while that court retained control of the case. Second: The pleading as contained in the record and transcript sent up to the appellate court went into and was filed in that court in its defective condition and an attempt was made in the appellate court to amend in that court, through a writ of certiorari to bring up an amendment made in the trial court after the appeal had been perfected, and, the transcript sent up and filed in the appellate court.

Circuit Judge Thompson in stating the case of Smith v. Jackson, says: "It is not pretended but that the record as it now stands is erroneous, and the judgment of the District Court must be reversed, unless the record is amended, and the object of setting aside the judgment on reversal is to *make way for a writ of certiorari, to bring up the amendments which have been made in the District Court.* The question then arises whether these amendments would be received here, and *attached to* the *record* which has *already been returned* into this court upon the writ of error; and I think these amendments ought not to be received here. They were made, according to my judgment, irregularly and without authority. *The judgment in the District Court was entered in January term, 1824. The record was filed and execution issued on the 3rd of March following. The writ of error was returned in the September term, 1824, of this court,* and in the January term, *1825,*" (one year after the judgment was entered) "the amendments were made,

etc." And in further expressing the opinion of the court in the case, Justice Thompson says: "Anciently the amendment could be made only in the term in which the judicial act was done and recorded; as during this term the proceeding was deemed to be in the judge's breast, and not in the roll. Afterwards a more liberal practice was introduced, and amendments were allowed at any time pending the suit or proceedings and while they were considered in *fieri*, and until final judgment was rendered and enrolled. But in no instance will it be found, I believe, that the court made any amendment whatever after the expiration of the term in which final judgment was given."

If defendant in error were before the court seeking to engraft on a record an amendment to a defective pleading, which amendment had been made after the adjournment of the term of the court at which the judgment was rendered, then, counsel might well say that Smith v. Jackson was a similar case, but in the case at bar the court was still in session and still had control of the case and the proceedings had, and at any time during the term, to be had therein.

In this connection we call the court's further attention to the language used by Judge Thompson in the opinion rendered in Smith v. Jackson, 1 Paine, 453, 22 Fed. Cases, No. 13,064, in refusing an application for writ of mandamus to the District Judge requiring him to vacate a rule which had been granted, allowing certain amendments of the record in the cause, and also to vacate

and annul said amendments, while the writ was refused, upon the ground "that this court has no authority to issue the mandamus applied for," Judge Thompson, in closing the opinion, says: "It may not be amiss barely to observe that the complaint in this case is for having improperly allowed certain amendments, which generally rest in the sound discretion of the court when the proceedings are pending and if this was a matter vested in the discretion of the District Court, it cannot be corrected or controlled either by a mandamus or writ of error."

We next consider Denny v. Pironi, 141 U. S., 121, quoted extensively by counsel for plaintiff in error on pages 17, 18 and 19 of their brief. In this case there was a defective averment of citizenship, in short, the averments were insufficient to give the trial court jurisdiction on the ground of diverse citizenship. Quoting from the opinion: "The case went to trial upon this allegation (an allegation of residence instead of citizenship) and a judgment was recovered against Denny and the sureties on his replevin bond for $2,224.70, the value of the property, besides $238.29 damages, with interest and costs. Motion was made for a new trial on February 23, 1891, * * * and was denied. Upon the same day motion was made in arrest of judgment, which had already been entered, upon the ground that there

was no allegation in the petition showing that plaintiff and defendants were citizens of different states, and no allegation to show that the court had jurisdiction."

The plaintiffs, Denny v. Pironi, supra, in whose favor judgment had been rendered, on the next day, we presume the day after the motion in arrest of judgment was filed, with the idea possibly that the defect in the pleading could be thereby, at least with the erroneous idea that thereby the record, in case of appeal, would contain a showing of diverse citizenship, filed a remittitur whereby they remitted from the $238.29 awarded them by the verdict as damages the sum of $5. In this remittitur set up that at the date of the institution of the suit, etc., he was a citizen of Texas, etc.

"Upon the filing of this *document*," (well says Justice Brown, by whom the opinion was rendered, in stating the case) "an order was made that, said remittitur be noted on the docket and filed herein as a part of the record of this cause and that the said sum of $5 be, and the same is hereby, remitted from the judgment of $238.29, assessed and adjudged as damages in said original judgment etc."

Indeed, it is most truly evident, as said in the opinion by Mr. Justice Brown that, "this remittitur (document) showed upon its face that it was not filed in good faith, but for the sole purpose of introducing, (getting into the record), the averment of citizenship; in other words this averment is the object and the remittitur the incident."

Counsel for plaintiff in error with seeming confidence in the strength of their position italicize the concluding words of the opinion, which are "As well might it be contended that the difficulty could be surmounted by filing an affidavit. In either case it would be impossible for defendant to take issue upon it, or submit to a court or jury, as upon a plea in abatement."

In the case above cited, Denny v. Pironi, no motion was made asking leave to amend, neither in writing nor verbally, no leave was asked or obtained in the case while it was still in the hands and within the control of the court to amend the declaration in the particular sought to be attained by filing the remittitur. *The Court may at any time* permit either of the parties to amend any defect in the process or pleadings U. S. R. S. Sec. 954, and "It is well settled that mere matters of proceedure such as the granting or refusing motions for new trial and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court and unless there has been gross abuse of that discretion they are not reviewable in this court on writ of error." Mexican Central Ry. Co. v. Pinkney 149 U. S. p. 201. "And, when such amendment is permitted the court must, in its discretion, determine whether any submission which had been made ought to be vacated." Bamberger v. Terry, 103 U. S., 13 Otto p. 40.

If Pironi & Slatri, defendants in error, in the case of Denney v. Pironi supra, had by a motion in writing

reciting the existence of the fact that at time of institution of the suit they were citizens of California and that defendant Denney, plaintiff in error, was a citizen of Texas. That by oversight or inadvertance such allegagations were in the first instance, omitted from the pleadings, and have satisfied the trial court that such was the case and have asked to amend and cure his petition in that regard, would it not have been within the discretion of the court to allow the amendment to have been made? If such motion had been made would it have been an abuse of the discretion with which the trial court is clothed by statute, in the absenee of any contest of the motion from the opposite party and the absence of any request for time or opportunity to contest, when, in fact, the opposite party is satisfied that the motion to amend speaks the truth, to grant the motion and permit the amendment? We submit that it would not.

That an averment of residence is not equivalent to an averment of citizenship and is insufficient to give the circuit court jurisdiction and that no amendment supplying the averment can be made in any other than the trial court, except by consent, appears to us to have been so often and repeatedly determined by the Supreme Court as well as the Circuit Court of Appeals, that, we deem a discussion of the proposition but a waste of time and tresspass upon the patience of the court. And while tendering every apology therefor, we plead in extenuation, the necessity forced upon us, by the brief of coun-

sel for plaintiff in error, of saying, that we believe no case has been cited by them in which any attempt was made within proper time and in the proper court to make the necessary amendment, that the action of the trial court, in permitting the amendment to be made, in the absence of any showing in the record of abuse of the discretion with which the trial court is in this particular clothed by statute and the oft repeated decisions of the Supreme Court and other appellate courts, has not been upheld.

Certain amendments will be permitted an any stage, of the case, so as to bring in an essential party or to aver citizensnip, Fisher v. Rutherford, Fed. Cases No. 4823; Hillard v. Brevoort, Fed. Cases No. 6505.

In view of the Statutes, Sec. 954 U. S. R. S. authorizing, in our opinion, the trial court to permit any amendment, which in such court's discretion works no injury to the adverse party and as reaches the end to be desired by all courts, substantial justice between the parties, we believe there can be no question of the disposition that should be made of this appeal. And if the appeal should not be dismissed, as we respectfully submit it should be, upon the grounds First: That it is an appeal from the action and ruling of the trial court in permitting an amendment to the pleadings and is not reviewable by the Supreme Court.

In the case of Mexican Central R. Co. v. Pinkney, 149 U. S. p. 201, Mr. Justice Jackson in delivering the opinion of the court, says:

"It is well settled that mere matters of proceedure, such as the granting or refusing motions for new trails, and questions *respecting amendments to the pleadings*, are purely discretionary matters for the consideration of the trial court, and, unless there has been *gross abuse* of that discreation, they are not reviewable in this court on writ of error."

See also Chapman v. Barney, 129 U. S , 677.

Second: That error will not lie to the Supreme Court on allowance or refusal of amendments by the trial court.

In 11th Wheaton p. 302, in Chirac v. Reinicker, Justice Story in delivering the opinion of the court, says:

"It has been decided by this court, that the allowance or disallowance of amendments is not matter for which a writ of error lies here."

In 2 Howard p. 284, Murphy et al. Admrs. v. Stewart (Matherson v. Grant). That being a case in which the record showed that the declaration contained two counts one in which plaintiff Stewart as Admr. of Alex. Grant, deceased, sued as administrator, and on the other count he sued in his own right to recover upon the same cause of action. There was a general verdict for the plaintiff, upon which judgment was rendered, said judgment being upon motion in arrest of judgment at the November term 1840, the ground of the motion being misjoinder of counts and causes of action. Thereafter at the November term 1841, counsel for plaintiff filed a motion, supported by affidavit, to set aside the order arresting judgment, and

asked to be permitted to enter a nolle prosequi as to the second count. The motion was granted and thereupon, at the November term 1841 judgment nunc pro tunc was entered upon the verdict applying it to the first count in the declaration.

In the above case, in the concluding paragraph of the opinion rendered by Judge Story, he says:

"There is yet another view of this matter. The question of the amendment was a question of discretion in the court below upon its own review of the facts in evidence; and we know of no right or authority in this court upon a writ of error to examine such a question, or the conclusion to which the court below arrived upon a survey of the facts, which seems to us to have belonged appropriately and exclusively to that court."

See also 20 Howard p. 264, Spencer v. Lapsley, wherein it is held:—

"This court has deceided that such applications are addressed to the judicial discretion of the inferior court, and its decision is not open for revision here. It has been decided that the refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial or continuance, or to reinstate a cause which has been dismissed can not be questioned for error in this court."

See also, Chapman v. Barney, 129 U. S. 677-81.

"We do not think the first assignment of error well taken, amendments are discretionary with the court below and not reviewable by this court."

Quoting from the opinion in the case of Tremaine v. Hichcock, in 90 U. S., 23 Wall. 518-529, Mr. Justice Bradley says:

"We think, therefore, that the order of the court directing that the record be amended by inserting in the bill an averment of the second re-issue was properly made, *though made after final decree. It deprived the defendants of no rights which they had not enjoyed during all of the progress of the trial. It may well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried.* It is true that an amendment which changes the character of the bill ought not generally to be allowed after a case has been set for a hearing, and still less after it has been heard. The reason is that the answer may become inapplicable if such amendment be permitted. *But in this case the defendants were not perjudiced. They had every advantage they could have had, if the bill had averred the second reissue.* The case is undoubtedly anomalous, but we think justice would not be subserved by denying to the circuit court the power to order such an amendment as was made, *after the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment.*"

We insist that the trial court did not err in permitting the plaintiff to amend his original and first amended original petitions in said cause, after judgment rendered at same term of court, record p. 28, and in support of our contention we cite this court to the case of Maddox v.

Thorn, 60 Fed. Rep., 217, which case is almost identical with the case at bar. And Judge McCormick, who rendered the opinion stated the law as follows:

* * * * "Without reviewing the authorities (which are very numerous) on the subject of the trial court's discretion to allow amendments of substance, pending a trial, without vacating the submission, we are of opinion that the provision of the statute which says any court of the United States 'may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe,' is broad enough to warrant the action of the trial judge in allowing the amendment on terms, and proceeding to judgment. This discretion is a legal discretion, and subject to review. The amendment offered was one of vital substance. The matter of it is generally susceptible of ready and abundant proof, and hence, in practice, it is most generally not contested, —is virtually admitted when properly pleaded. It is, however, necessary to be proved, unless so virtually admitted, when it is put in issue by proper pleading. It is not now material to inquire what character or amount of proof on that subject is prima facis sufficient. The pleading having been sworn to by plaintifi's counsel, who was still in court to be cross-examined if the defendant so desired, and nothing then shown by the defendants, or yet shown by them, to indicate that the discretion was improvidently exercised, we are of opinion that this assignment of error is not well taken."

We respectfully call your Honors' attention to the fact that, in the case at bar, plaintiff himself made affidavit to his motion to amend his original and first amended original petitions, and under oath stated, that he was at the date of his injuries and was when the original petition was filed and the cause tried, a *bona fide* citizen of the United States of America and of the State of Texas. Record p. 28. And that when said motion to amend was submitted to the court, the parties being then before the court and defendant making no effort to contest nor asking for any time in which to procure evidence to contest the affidavit of plaintiff acquiesced in its truthfulness, and we do not believe they can be heard to complain now. In the absence of any showing in the record that the trial Court had, as said in Maddox vs. Thorn supra, "improvidently exercised" its discretion.

We further desire to call the attention of this court to the case of Fitchburg R. Co. v. Nichols, 85 Fed. Rep., 869. In which case Judge Putnam in rendering the opinion of the court, states the law thus:

"The record in this case contains the suitable allegations to show the citizenship of the corporation defendant in the court below, but it fails in this respect as to the plaintiff below. There are only two courses open. If the plaintiff below is an allien, or a citizen of some state other than Massachusetts, the record may be amended in this court according to the truth by the consent of both parties. Fletcher v. Peck, 6 Cranch, 87,

127; Kennedy v. Bank, 8 How. 586, 611; U. S. v. Hopewell, 51 Fed. 798,800, 2 C. C. A. 510; Nashua & L. R. Corp. v. Boston & L. R. Corp., 9 C. C. A. 468, 61 Fed. 237, 245. If this is not done, the judgment of the court below must be reversed. *It is not necessary to set aside the verdict*, as the court below may allow an amendment, in accordance with the facts, to supply the defect, *as well after verdict as before*, provided it gives the adverse party an opportunity to meet the new issue thus raised, if that party is advised to do so. All this is not only in accordance with the general principles of law, but is emphasized by section 954 of the Revised Statutes, and paregraphs 1 and 3 of rule 11 of the circuit court.

We submit that the above case is directly in point with the one at bar, ours being even a stronger case, for in that case, the appellate court holds that the pleadings of plaintiff might be amended in the trail court so as to allege his citizenship, after said cause had gone to the circuit court of appeals in that defective condition, without (upon remand to the trial court) setting aside the verdict. In the case at bar plaintiff corrected the omission in his pleadings while all the parties were still in the trial court.

We contend that the Court had the power to allow the amendment to show diverse citizenship, and the exercise of the court's discretion, in permitting the amendment, *is not assignable error.*

We are constrained to believe that learned counsel for plaintiff in error are mistaken in the law governing

the practice in the United States Courts, when they contend, brief p. 22, 24, that, "amendments such as were allowed in the case at bar by the trial court are prohibited by the laws of the State of Texas, and that the courts of the United States are *governed* by the laws of the State where the litigation is had."

Mr. Cooley in his treatise on Constitutional Law, p. 32, says:

"A State law must yield to the Supreme law, whether expressed in the Constitution of the United States or any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the 'Supreme Law' was adopted or enacted afterwards."

We are aware that amendments such as were allowed in the case at bar are not permitted by the laws of this State, but inquestionably such amendment is allowed under Art. 954, R. S. U. S. Where the laws of the State and those of the United States conflict, the laws of the latter govern.

We believe that the following decisions of the Supreme Court of the United States involving the question of practice in United States Courts where same are in conflict with the laws of a State dispose of the question and conclusively show that there is nothing in the contention of counsel for plaintiff in error on that point.

In the case of Phelps v. Oaks, 117 U. S. 236, 241,

carried up from the Circuit Court of the United States for the Western District of Missouri, the Court in delivering its opinion, says:

"The Statute of Missouri provides, * * * * and it is assumed that the Statute is equally obligatory upon the Courts of the United States. But this is a mistake."

"Undoubtedly it was the duty of the circuit court in this case to give effect to the Statute of Missouri, as far as it could, but not to the extent of its jurisdiction. 'It must be held,' as was said in Erstein v. Rothschild, 22 Fed. Rep. 61, 64, 'That the body of the local law thus adopted in the general, must be considered in the Courts of the United States in the light of their own system of juris. prudence, as defined by their own Constitution as tribunals, and of the acts of Congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the Courts of the United States in each State, in reference to their own practice and proceedure, upon the footing merely of subordinate state courts, required to look from time to time to the supreme court of the State for authoritative rules for their guidance in those details. To do so would be, in many cases, to trench, in important particulars not easy to foresee, upon substantial rights, protected by the peculiar Constitution of the federal judiciary, in which might seriously affect, in cases easily supposed, the proper corelalation and indenpendence of the two systems of federal and state judicial tribunals."

And in the case of the Southern Pacific Company v.

Denton, 146 U. S. 202, 210, a case carried to this Court on writ of error from the Circuit Court of the United States for the Western District of Texas, and in which it was decided by this Court, that jurisdiction of Circuit Courts are not restricted nor enlarged by State Statutes.

Mr. Justice Gray in delivering the opinion of the Court, says, referring to Rev. Stat. Sec. 914: providing that practice, pleadings etc., in Circuit and District Court shall conform as near as may be to practice pleadings etc., in State Courts.

"In one of the earliest cases that arose under this Act, this Court said: 'The conformity is required to be' —not as near as may be possible, or as near as may be practicable. This suggestion may have been suggested by a purpose: it devolved upon the judges to be affected the duty of construing and deciding, and gave them power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." Indianapolis & St. L. R. Co. v. Horst, 92 U. S. 291, 300.

Under this Act, the Circuit Court of the United States following the practice of the courts of the State in regard to form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defenses on the merrits shall be pleaded successively or together. * * * * * * But the jurisdiction

of the circuit courts of the United States has been defined and limited by acts of Congress, and can neither be restricted nor enlarged by the Statutes of the State. * * * * * * And whenever Congres has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. Ex parte Fisk, 113 U. S. 713, 721; Whitford v. Clark County, 119 U. S. 522. * * * * * * * * * * * * To conform to such Statute of a State would "unwisely incumber the administration of the law," as well as "tend to defeat the ends of justice," in the national tribunals. The necessary conclusion is that the provisions referred to, in the practice act of the State of Texas, have no application to actions in the courts of the United States."

Plaintiff in error complains or rather seeks to sustain its position in this appeal with this statement on page 27 of their transcript "There is nothing in the record to show that defendant was given an opportunity of combating this showing (referring we a pprehend to the motion and affidavit of defendant in error for leave to amend in the lower court) "by filing counter affidavits, and the precipitancy with which the proceeding were rushed through would seem to preclude any such possibility."

With all due deference to counsel, we are constrained to say that their criticism of the action of the trial court, as to precipitancy, is as unwarranted and un-

just as is their contention or rather their ostensible contention that the record should show that they had an opportunity to contest the motion to amend. It certainly appears to us that the record should contain some evidence that plaintiff in error *did not* have an opportunity to contest the motion, and in the absence of such showing on the face of the record the presumption obtains that they had every opportunity they desired to contest the motion and the record should show affirmatively that the court acted precipitately in the matter of permitting the amendment, before plaintiff in error could be heard to say that he had been wronged by the court's action.

It must certainly be presumed that all courts act justly, upon due consideration, after full hearing and deliberately, and certainly this record fails to dis-close that the trial court acted otherwise in this case, and to overcome the presumption of fairness in the action of the court it is incumbent upon plaintiff in error to establish the fact that the court has acted unfairly or that an injustice has been done it.

We feel that no other answer to this part of the brief for plaintiff in error is necessary or becoming, than to say, that instead of their having any complaint against the action of the court on the grounds stated, the very fact that the amendment was permitted, and the record failing to show that plaintiff in error was not given an oppertunity to contest, is conclusive that the trial court acted within his discretion discreetly and that there was no abuse of that court's discretion to the in-

jury of plaintiff in error.

In conclusion we desire, with tne court's permission, to submit this motion to dismiss and affirm this cause, upon repetition of grounds hereinbefore stated as well as the following:

First: Because error will not lie from the action of the trial court in permitting amendments.

Second: Because the question by this appeal sought to be presented for consideration of the Supreme Court on which the jurisdiction depends is so frivolus as not to need further argument.

Desty's Federal Proceedure Book 2, Rule 6 of the Supreme Court, subdivision 5; Swope v. Leffingwell, 15 Otto p. 3; Bullit Co. v. Washer, 130 U. S. 142, Central Trust Co. v. Grant Locomotive Works, 135 U. S. p. 207; Northern P. R. Ry. Co. v. Austin, 135 U. S. 315; Gromley v. Bunyon, 138 U. S. 623.

Respectfully submitted,

Atty. for Defendant in Error,

J. M. DUTHIE.